79-881

Supreme Court, U.
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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-883

JOHN N. MITCHELL,

Petitioner,

v.

BERTRAM ZWEIBON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS

NATHAN LEWIN
MARTIN D. MINSKER
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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MEMORANDUM FOR RESPONDENTS

The United States, representing the former Attorney General, has filed a petition for a writ of certiorari in this case stating that the "important and unsettled questions" presented by the decision below are "identical" to those presented in *Kissinger v. Halperin*, No. 79-880, in which the government has requested certiorari. We do not agree that the issues in the two cases are "identical" by any means. This case does not involve the liability of a former

President in any shape, manner, or form. Thus it is plain that pages 11-20 of the government's petition in *Kissinger v. Halperin*, No. 79-880, are totally irrelevant to this case.

There are, to be sure, issues in this case concerning the "immunity of high-level Executive Branch officials from damages liability" (Petition, p. 10), but those issues, *on the facts of this case*, were fully and finally resolved by this Court in *Butz v. Economou*, 438 U.S. 478 (1978), which held that a cabinet officer enjoys no greater immunity from civil suit than the qualified immunity possessed by a governor of a State. Compare *Scheuer v. Rhodes*, 416 U.S. 232 (1974). There has never been a scintilla of proof – or even a suggestion by any party or witness – that the warrantless wiretap which is at issue in this case was authorized by, or known to, former President Nixon. Consequently, the fact – if it be one – that no court "had ever ruled that the President of the United States may be held personally liable in money damages for the official acts that he takes during his conduct of office" – which the Solicitor General cites as impressive proof of the need for review by this Court (Petition, No. 79-880, p. 11) – has nothing to do with this lawsuit by members of the JDL against the former Attorney General. And the absence of any claim against the President is not affected by the Solicitor General's nonfactual definition of the Question Presented as being whether Mr. Mitchell is liable "for acting on behalf of the President" to authorize a wiretap. The assertion that President Nixon – like others before him – generally countenanced warrantless wiretaps for national security purposes does not make him a participant in this particular wiretap. Nor, since he has not been sued in this case, does a review of the President's immunity from civil liability affect this case.

We believe that at this point – eight years after the lawsuit was first instituted and after two erroneous attempts by the trial judge to conclude the case in the defendants' favor – it is about time that the parties proceed to the merits. But we recognize that there are important issues relating to civil liability in the decision below. These pertain generally to the "retroactivity" of the decision in this very case, and they invoke particularly the questions we have presented in our cross-petition, *Zweibon v. Mitchell,* No. 79-883. In addition, if the Court were to consider the question whether Mr. Mitchell is immune, to any degree, from civil liability because of his "high-level Executive Branch" position, it should also consider the question decided by the court of appeals on its first disposition of this case in 1975 (*Zweibon v. Mitchell,* 516 F.2d 594 (1975)). At that time, the court below held, admittedly contrary to a "literal interpretation" of 18 U.S.C. § 2520 (516 F.2d at 570) that a good-faith belief in the lawfulness of his conduct would be a complete defense to the former Attorney General in this lawsuit. The legislative history of the statute and its terms contradict this broad good-faith defense.[1]

If the government's suggested procedure were followed – *i.e.,* if this case were held on the Court's docket until *Kissinger v. Halperin,* No. 79-880, is briefed, argued and decided – the chances are that the resolution of that case would affect few, if any, important issues in *Zweibon v. Mitchell.* The only consequence would be that a case

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[1] Since the question was not discussed when the court of appeals issued the decision now under review, we could not make it the basis for a cross-petition. In 1976, this Court denied certiorari on that issue when it was presented alone. However, if the Court were now to grant the government's petition and ours, it would be a waste of judicial resources to leave the "good-faith" issue unresolved until after a trial on the merits.

which is already eight years old would be deferred for another two years. On the other hand, if the government's petition for a writ of certiorari in this case were granted together with our cross-petition, the issues unique to this case – which may prove dispositive – would be considered and decided on this record. Consequently, although we regret any additional delay, we suggest that the Court grant the government's petition, No. 79-881, and our cross-petition, No. 79-883, so that the full range of issues – including the availability under 18 U.S.C. §2520 of a subjective good-faith defense – can be argued and decided.

Respectfully submitted,

NATHAN LEWIN
MARTIN D. MINSKER
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Respondents.